Filed 1/7/09 In re Melanie C. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MELANIE C. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. DIANNA H. et al., Defendants and Appellants.	G040354 (Super. Ct. Nos. DP003315 & DP010242) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James P. Marion, Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant Dianna H.

Michael D. Randall, under appointment by the Court of Appeal, for Defendant and Appellant Michael C.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

Dianna H. and Michael C. separately appeal from an order that terminated parental rights to their two children, Melanie C. and Donovan C., pursuant to Welfare and Institutions Code section 366.26.[1] Dianna argues the juvenile court should have granted her modification petition; and erred in not applying the benefit exception. (§ 366.26, subd. (c)(1)(B)(i).) Michael makes the same arguments (his modification petition should have been granted and the benefit exception applied to him as well), and he also contends the children were not adoptable. None of these points is meritorious, so we affirm.

FACTS

This is the fourth time we consider this case. In prior opinions, we affirmed a July 2007 order denying Michael's prior modification petition (*In re Melanie C.* (Apr. 3, 2008, G039226 [nonpub. opn.]), denied a petition for a writ of mandate challenging a December 2007 order that denied Dianna's modification petition (*Dianna H. et al. v. Superior Court* (Apr. 3, 2008, G039661 [nonpub. opn.]), and dismissed Michael's appeal from the same December 2007 order that also denied his second modification petition. (*In re Melanie C*. (Sept. 30, 2008, G039864 [nonpub. opn.].) The details of the case are set out in those opinions and will not be repeated here. We shall reprise the facts germane to this appeal and add developments subsequent to December 2007.

The case has been in the dependency system on and off since 2000, during which time three dependency petitions have been sustained. The causes for dependency were substance abuse by both parents, domestic violence, both parents' refusal to obey a restraining order that Michael not contact Dianna or visit her home, and failure to protect the children or care for them due to substance abuse.

The current petition was sustained in October 2006. The juvenile court found Dianna had been allowing Michael to live with her and the children for some time, and they had been using methamphetamine and fighting. Since reunification services had

[1] All further statutory references are to the Welfare and Institutions Code.

already been offered for the maximum time allowed by law – without success – additional services were denied and the children removed from parental care.

At a February 2007 selection and implementation hearing, the juvenile court found Melanie and Donovan were adoptable but hard to place. The matter was continued to allow the Orange County Social Services Agency (SSA) to indentify a prospective adoptive family. At several subsequent selection and implementation hearings, including one in December 2007, the matter was continued again for the same reason. With another hearing set for April 2008, Dianna and Michael filed the instant modification petitions (Dianna's second, and Michael's third).

Dianna's petition sought return of the children or, alternatively, further reunification services. In a supporting declaration, Dianna said she had devised her own case plan after services had been denied, and set out her accomplishments. Much of what is said repeats her December 2007 petition. Beyond that, Dianna alleged she had completed a second drug treatment plan in March 2008 but did not get a completion certificate owing to "a payment dispute." She documented attendance at alcoholics anonymous or narcotics anonymous meetings regularly (the forms do not indicate which), although there is nothing after early December 2007. Dianna claimed to have tested negative for drugs twice a week without any missed or diluted tests, save for one occasion in February 2008 when a bus broke down, for which she provided a letter attesting to that fact. She offered certificates showing completion of a second "personal empowerment program," a parenting program, and an anger management program, all in April 2008. Dianna claimed to have stable housing and a regular job, although there is no documentation for the latter past June 2007.

SSA disputed Dianna's claim of no missed drug tests. A social worker reported Dianna missed two tests in February 2008, and there was one in March 2008 where insufficient volume was received. SSA agreed one of the missed February 2008 tests was due to a bus breakdown.

Michael's petition likewise asked that the children be returned to him, or alternatively that he be granted further reunification services. A supporting declaration was offered. Michael pointed to his 2007 completion of a batterer's program, a parenting class, and individual therapy. He said he had continued the positive conduct previously outlined – since March 2007, he had been living in a sober home, tested drug free, and was gainfully employed. The only new material since his December 2007 petition was a move into a different sober living home (March 2008), and enrollment in a second batterer's program where a progress report (February 2008) confirmed he was complying with program requirements.

The petitions were argued and denied in April 2008. The juvenile court found nothing different since the prior modification petitions in December 2007 – circumstances changing, but not changed. The court also found it would be detrimental to return the children to the parents, saying it agreed with SSA's argument that "to return the children . . . to the parents . . . would be a disastrous situation. There's no showing they're able to . . . maintain the children, and throwing these children . . . again, into this tumultuous situation . . . would be a disaster to these children."

The selection and implementation hearing followed. A court appointed special advocate for Melanie reported "[Melanie] is bonded to her biological family, but mostly with [her] brother Donovan." (The basis for these conclusions is not given.) The assigned social worker testified both children were adoptable despite some anxiety issues, emotional disorders, and acting out, for which they were being treated with therapy and medication. She believed adoption – and a stable home – was their best chance to overcome these developmental problems. The social worker said both parents had visited regularly, behaving appropriately, and during visits they comforted the children and addressed their needs.

The prior social worker (Dena Hartley), who had worked with the children for the preceding three years (ending in February 2008), testified Melanie had been

through nine placements and Donovan six, and "the children need a permanent and safe home." Hartley agreed the children were adoptable. She thought it would be best if they could maintain contact with their parents after adoption, but even if not, they would benefit more from a permanent, adoptive home than from continued parental contact. Hartley said that during her time on the case, the children looked forward to parental visits, the visits were important to them, and "by and large, the visits . . . were positive experiences for the children."

The parents and both children testified. Dianna said the children would run up and jump into her arms when she and Michael visited shouting "'mommy, mommy'" (the placement was in Kern County and the parents would make the trip out together). She would play with them, tell family stories, and talk about what they were doing. If they did something unsafe, Dianna would intervene and direct them to something else. Dianna said she had a very close relationship with Melanie, who would confide her problems and "wanted mommy to fix it."

Michael testified he played with the children during visits, showed them how to do things, encouraged them, and reassured Melanie when she was scared. The children told him they loved him and wanted to see him. Melanie worried about him and dreamed he had died, and wanted to be held and told Michael loved her. Donovan said he wanted Michael to live with him.

Melanie, then eight, wanted more time to visit with Dianna and Michael, saying "I love my family . . . a whole bunch, a whole bunch. She would feel "really bad" and cry if she could not see them again. When asked who among her parents, the foster parents interested in adopting the children, and anyone else, were the most important people in her life, Melanie first said the foster parents, then her parents, followed by Donovan, an adult sister, and her grandparents. Given any wish she could have, Melanie wanted to live with her parents and siblings, and "no more fighting with my mom and dad." The social worker (Hartley) had talked to Melanie about adoption, telling her she

would have "two families instead of one." Melanie felt good about that because she would have more people in her family and "I love this [adoptive] family very, very much, too." She would be "very, very sad" if she could never see her parents again. Seeing her parents once a year would not be enough, and she would like to go on visiting once a month. Melanie was happy living with the foster family and wanted to remain there, saying it had been sometimes "scary" living with her natural parents, as when Dianna had to call the police because Michael would not leave. (The 2006 incident that precipitated events the instant petition.) She felt a little safer with the foster parents and wanted to be adopted.

Donovan, a six-year-old first-grader, felt sad when his calls from Dianna or Michael ended because he really loved both of them. He wanted more time to talk with Dianna. His visits with them were not long enough, and he would be sad if he never saw them again. Asked where he would live if he had his wish, Donovan said "I want to live with Marcy and Leonard . . . I want to live with this mom and dad I'm living with right now." They were "real nice" and "they don't fight . . .[like] my other mom and dad fight. The social worker had not talked with him about adoption, but Donovan said it meant "you get to be with the family forever" and he would feel happy to be adopted. He, too, wanted to see his natural parents again even if he was adopted.

The juvenile court found the children were adoptable, there were no exceptions, and it terminated parental rights. It noted a court appointed psychologist and both social workers offered their professional opinions the children were adoptable. While the children had problems in the past, now "they're thriving, they're free from violence, [and] free from fear." The court found both parents had visited regularly, but the benefit of a stable adoptive home outweighed the benefit of continuing the parental relationship. It said the children's sadness at not seeing the parents was not enough to overcome the benefit of adoption, both children wanted a "'forever family,'" and they had been out of Dianna's care for half of their respective lives (four of eight years for

Melanie and three of six for Donovan). The court summed it up this way: "As I said the last time, they've been through hell and this is their last chance to get a little piece of heaven . . . and I can't stop that from happening. And the bottom line is they can survive happily and securely without contact with their parents and that's what the evidence suggests here."

I

Dianna and Michael argue their modification petitions set out a prima facie case that entitled each of them to an evidentiary hearing. We think not.

To warrant modifying a prior order, a parent must show circumstances have changed and the requested modification would be in the child's best interests. (§ 388; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Changing circumstances are not enough. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Dianna argues denial of her petition was an abuse of discretion, since she "truly changed her life and is capable of caring for her children." We disagree. The juvenile court's finding of only changing circumstances was within its discretion. As we said in affirming the denial of Dianna's December 2007 modification petition, "[i]t must be remembered that from 2000 to October 2006, Diana abused drugs, engaged in domestic violence, and failed to protect the children from Michael's abuse. Twice the children were returned to her, only to be removed again. Considered against this history, it was reasonable to find that what she had accomplished by December 2007 showed things were moving in the right direction but had not yet changed." (*Dianna H. et al. v. Superior Court*, *supra*, G039661, at p. 6.)

The instant petition added little to what Dianna had offered in December 2007– mainly duplicative social skills programs – and it is notable for what was not said. Glaring are the silence regarding the two missed drug tests in February and March 2008 (in addition to a third missed test for which she had an excuse), the vague claim Dianna did not get a completion certificate for a second drug treatment program in March 2008

because of a "payment dispute," and the absence of documentation for claimed Alcoholics Anonymous or Narcotics Anonymous meetings after December 2007. These are always difficult cases and this one is no exception, but there is no doubt the juvenile court acted within its discretion in finding Dianna had not shown changed circumstances. Since that alone is sufficient to sustain denial of the petition, we do not reach the argument the change sought would be in the best interests of the children.

Michael argues it is unreasonable to deny his petition because he had been drug free for a year and a half and had completed a second domestic violence (or batterer's) program. We must disagree.

When the juvenile court denied Michael's December 2007 modification petition, it said "it wasn't just drugs or alcohol . . . it was [also] domestic violence. The reason why Donovan and Melanie have . . . nightmares and . . . problems is because of what they witnessed as little kids. . . . [¶] . . . [I]t's going to take a lifetime for them to get over what they've gone through. [¶] I don't think it's . . . changed circumstances. I think [it's] changing. But I don't think based on what I see . . . [that] it's changed circumstances." (*In re Melanie C.*, *supra*, G039864, at p. 3.)

It was entirely reasonable for the juvenile court to find another four months of sobriety and a repeat batterer's program did not advance the situation from changing to changed circumstances. Michael has not shown it was an abuse of discretion to deny his modification petition.

II

Dianna and Michael both argue the juvenile court erred in finding the benefit exception did not apply. Each asserts they visited regularly, had an established parental bond with the children, and the children would benefit from continuing the parent-child relationship. All of this is true, but the court below acted well within its discretion in finding the true parts insufficient.

The benefit exception applies if parents "have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) To determine whether a child would benefit from continuing the parental relationship, "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of *a substantial, positive emotional attachment such that the child would be greatly harmed*, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, italics added.)

Here, both parents overlook the key issue – the finding that Melanie and Donovan would benefit more from the stability of a permanent adoptive home than from continuing the parental relationship. All they say is true – the juvenile court found both parents had visited regularly, had established a parental bond with the children, and the children would derive some benefit from continuing the parental relationship. But that is not enough. The law requires a weighing of these factors against the benefits of adoption, and the court found on balance the children would be better off if given the chance for a new adoptive home –"their last chance to get a little piece of heaven." It noted that while the children each said they would be sad if they could not see Dianna and Michael again, "sadness of the children . . . [over] not seeing their parents is not enough" to show they would be greatly harmed by terminating the parental relationship. Since neither parent attempts to explain why this balance was mistaken as a matter of law, there is no showing of error in finding the benefit exception was not proven.

Dianna's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 is misplaced. There, the court found a parent proved the benefit exception where he fully complied with his case plan and was unwavering throughout the dependency process in seeking treatment for substance abuse and combat-related posttraumatic stress disorder. (*Id*. at

pp. 294, 300-301.) The same cannot be said of Dianna. Her record of compliance with her case plan was inconsistent from 2000 to 2006, when the children were removed from her custody for the third time. The reason was she had violated the plan by using drugs, allowing Michael to live with her despite a restraining order, and engaging in domestic violence. Nor can we overlook doubts about Dianna's commitment to sobriety at the time of the selection and implementation hearing – two missed drug tests in early 2008, a dubious excuse for not receiving a completion certificate for a drug program in March 2008, and the absence of any verification of attendance at Alcoholics Anonymous or Narcotics Anonymous after December 2007. So Dianna's case is factually distinguishable from the exemplary conduct of the parent in In re *S.B.* The benefit exception was not established by either Dianna or Michael.

III

Finally, Michael contends the evidence does not support the finding Melanie and Donovan were adoptable. The point is wide of the mark.

To prevail on a substantial evidence challenge, it is not enough to point out the favorable evidence, since an appellate court cannot reweigh the evidence. What is required is that an appellant set out the unfavorable evidence and show why it is inadequate. (*In re S.C.* (2006) 138 Cal.App.4th 396, 414-415.)

Here, a court-appointed psychologist and both social workers who had handled this case opined the children were adoptable, although earlier in the dependency process they had exhibited emotional and acting-out problems. Michael fastens upon the problems without acknowledging the evidence they had been overcome, or the professional opinions they were not an impediment to adoption. At best, then, he points to some contrary evidence of non-adoptability and argues it was more persuasive. That fails to show the evidence supporting adoptability was inadequate.

Since the modification petitions were properly denied for want of changed circumstances, the benefit exception was not met, and the evidence supports the finding the children were adoptable, we must affirm the order appealed from.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.